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In the Supreme Court of the United States

OCTOBER TERM, 1967

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA, PETITIONERS

v.

AKTIEBOLAGET SVENSKA AMERIKA LINIEN (SWEDISH AMERICAN LINE), ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL MARITIME COMMISSION

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OPINIONS BELOW

The first report and order of the Federal Maritime Commission (R. 451–503)[1] appears at 7 F.M.C. 737. The opinion of the court of appeals remanding the case to the Commission (R. 517–528) is reported at 351 F. 2d 756. The Commission's report and order on remand (R. 531–587) has not been officially reported but appears at 7 Pike & Fischer S.R.R. 457. The second opinion of the court of appeals (R. 651–654) is reported at 372 F. 2d 932.

[1] "R" refers to the printed Appendix in this Court.

JURISDICTION

The judgment of the court of appeals (R. 655) was entered on January 19, 1967. The Chief Justice extended the time for filing a petition for a writ of certiorari to June 18, 1967. The petition was filed on June 16, 1967, and was granted on October 9, 1967 (389 U.S. 816).[1a] The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1) and 2350(a) (Supp. II).

STATUTES INVOLVED

The pertinent provisions of Section 15 of the Shipping Act, 1916, 39 Stat. 733, as amended, 46 U.S.C. 814, provides in pertinent part:

> Every common carrier by water, or other person subject to this chapter, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or

[1a] On October 9, 1967, the Court also granted the petition in No. 258 (389 U.S. 816), consolidated the two cases and placed each on the summary calendar.

in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The Commission, shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations. * * *.

* * * * *

Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation; * * *.

Every agreement, modification, or cancellation lawful under this section * * * shall be excepted from the provisions of sections 1–11 and 15 of Title 15, and amendments and Acts supplementary thereto.

QUESTIONS PRESENTED

Section 15 of the Shipping Act, 1916, as amended, 46 U.S.C. 814, directs the Federal Maritime Commission to disapprove any agreement between carriers affecting competition that the Commission finds, *inter alia*, detrimental to the commerce of the United States or contrary to the public interest. In the present case, the Commission disapproved two provisions of passenger steamship conference agreements, one prohibiting travel agents handling conference business from selling passage on competing, non-conference lines (the so-called "tieing rule"), the other requiring unanimous action by conference members before the maximum rate of commissions payable to travel agents may be changed (the "unanimity rule"). The questions presented are:

1. Whether the Commission properly disapproved the tieing rule upon finding that it was seriously anticompetitive and did not further a legitimate purpose.

2. Whether the Commission properly disapproved the unanimity rule upon finding that it (a) impaired the ability of the conference members to compete with other modes of transportation, (b) impaired the flexibility of the conference in responding to changed circumstances, and (c) served no overriding public purpose.

STATEMENT

These proceedings grow out of a comprehensive investigation instituted in 1959 by the Federal Maritime Board [2] on the complaint of the American So-

[2] By Reorganization Plan No. 7 of 1961, 75 Stat. 840, effective August 12, 1961, the regulatory functions of the Federal

ciety of Travel Agents (a trade association). The inquiry concerned agreements and practices affecting travel agents by two overlapping passenger steamship conferences—the Transatlantic Passenger Steamship Conference and the Atlantic Passenger Steamship Conference. While in form distinct legal entities, these two old conferences are closely coordinated and, together, they determine and enforce uniform policies and practices for the member lines, including the fixing of transportation rates, the selection and control of travel agents, and the fixing of maximum rates for commissions payable to travel agents. Both operate under conference agreements approved by the Commission pursuant to Section 15 of the Shipping Act.

The Atlantic Passenger Conference has its headquarters in England and keeps its records there. It is responsible for setting uniform fares and the maximum rates of commission for travel agents. The Trans-Atlantic Passenger Conference, which has its headquarters in New York, is responsible for the selection and supervision of travel agents in the United States and Canada. Membership in each conference is almost identical and includes both foreign and domestic lines (R. 534, 539),[3] who together account for 99 percent of the transatlantic passenger steamship

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Maritime Board were transferred to the Federal Maritime Commission, and the former agency was abolished.

The word "Commission" will be used to refer to the Federal Maritime Commission or its predecessor agencies, as the context may require.

[3] There are 25 lines in each conference. TAPC consists of two American-flag carriers and 23 foreign-flag carriers. APC consists of three American-flag carriers and 22 foreign-flag carriers.

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traffic. They obtain most of this traffic through the services of travel agents appointed by them. In 1960, a typical year, these agents booked 80 percent of all transatlantic ocean passage (exclusive of cruises). (R. 371).

After a full evidentiary hearing, the Commission's examiner recommended disapproval of certain provisions of the conference agreements and a number of practices, on the ground that they were detrimental to the commerce of the United States and contrary to the public interest (R. 402–450). He found the conferences guilty of many abuses in the selection and control of travel agents. Among other defects in procedure, he criticized the inadequacy of the reports filed with the Commission, noting that the abbreviated minutes of conference meetings did not disclose the votes, the agenda, the discussion of the members, or proposals which were not adopted (R. 423–424, 446–447). The examiner recommended disapproval of the so-called "tieing rule", which prohibits travel agents who are authorized to book passage on conference lines from selling bookings on any competing non-conference vessel (R. 440–441). With respect to the "unanimity rule"—which requires a unanimous vote of the conference members before the maximum level of commissions paid travel agents may be changed—the examiner recommended only that those lines which engage in little or no service to ports in the United States (at least seven, or more than one-fourth of the members) not be permitted to vote on the rates of commission to travel agents in the United States (R. 421, 444).

By the time the case came before the Commission itself, the conferences had agreed to make changes in the agreements sufficient to remedy most of the defects found by the examiner. The two major issues which remained related to the tieing rule and the unanimity rule.[4] The Commission upheld the examiner's disapproval of the tieing rule (R. 484–485) but disagreed with his qualified acceptance of the unanimity rule. It ordered the elimination of the unanimity rule (R. 475–478), indicating that, once their veto power was removed, there would be no objection to allowing the lines which do not serve United States ports to have some voice in matters relating to rates of commission (R. 486–487).

On review, the Court of Appeals for the District of Columbia Circuit set aside the order and remanded the case to the Commission for reconsideration (R. 517–528). The court held that the Commission could not base its disapproval of the tieing rule on the ground that the arrangement was anticompetitive and contrary to antitrust principles; that it had to find the agreement in conflict with one of the four specific criteria of Section 15 (R. 525–527, 528). It further held that the Commission had not sufficiently explained the basis of its ultimate finding that the unanimity rule operated to "the detriment of the commerce of the United States" within the meaning of Section 15 of the Act. The court directed the Commission either to make adequately supported ultimate

[4] The conferences did continue to defend the lawfulness of the unanimity provision as applied to certain matters other than the rates of commission, but they did not appeal from the Commission's rejection of the provision as thus applied.

findings to justify disapproval or to approve the two clauses (R. 525, 528). Review was not sought here.

On remand (R. 531–587), the Commission made extensive findings, explained its rationale in detail and again disapproved both provisions. The Commission found the tieing clause seriously anti-competitive on three levels: conference-approved travel agents were thereby denied the opportunity to book passengers on non-conference vessels; non-conference carriers were foreclosed from using the services of conference-approved agents; and the traveling public was denied the valuable service of such agents if it wished to travel on a non-conference carrier (R. 562, 565). Finding no legitimate reason for the rule, the Commission concluded that it "invades the prohibitions of the antitrust laws more than is necessary to serve the purposes of the regulatory statute" and disapproved it as detrimental to the commerce of the United States, unjustly discriminatory as between carriers and contrary to the public interest (R. 565–567).

The Commission found that the unanimity rule contributed to the disadvantage experienced by steamship lines in competing for trans-Atlantic passengers with the airlines, since a substantial majority of Conference members were prepared to grant an increase in travel agents' commissions [5] which would have reduced

[5] The Commission pointed out that on at least one occasion a single conference member had blocked an increase in the maximum commission rate (R. 536, 553–554). This information was revealed by the records of one of the conference lines (R. 374(2)). The conference records of the meeting with respect to agents' commissions, however, report only "[n]o minute" (R. 344–345, item 8).

the tendency of agents to promote airlines at the expense of ships (R. 560–561). The Commission was also concerned that the unanimity requirement would deprive the conferences of a workable decision-making process that could respond effectively to changing economic conditions, and reasoned that the rule should not be approved without some demonstration—not forthcoming—that the rule served a legitimate objective (R. 555–557, 561). The Commission concluded that higher commission rates would have made a significant difference in improving the economic situation of the steamships and that continuation of the obstructive unanimity requirement would be detrimental to the commerce of the United States and contrary to the public interest (R. 560–561).

On the second petition for review, the court of appeals again set aside the Commission's order (R. 651–655). Without discussing the Commission's findings or legal rationale and without any further indication by the court of its view of the proper standards under Section 15, the court concluded that the Commission's decision "consists only of rationalizations, conjecture and opinion" and that "the Commission has [not] made adequate response to our mandate to eliminate the doubts and problems which we pointed out in our prior opinion" (R. 654). The Commission's order was accordingly set aside as "arbitrary and capricious and not supported by substantial evidence on the record considered as a whole" (R. 654). The court refused to order another remand, entering instead a simple judgment of reversal.

ARGUMENT

I

INTRODUCTION AND SUMMARY

The Commission disapproved two clauses in the conference agreements of the transaltantic passenger lines—the tieing rule and unanimity rule—because they were unfairly and unnecessarily restrictive. Although predicated on the ultimate finding, in the terms of Section 15 of the Shipping Act, that the challenged provisions operated to the detriment of the commerce of the United States and were contrary to the public interest, the order was set aside by the court below. Apparently, the reason was that, in the court's view, the Commission acted without sufficient tangible proof of the injury resulting from these practices and relied too much on its own expert opinion. In a different case that ground would present only very particularized issues. But, considering the character of the rules in suit, the court's decision raises fundamental questions about the relevance of antitrust considerations in applying the Shipping Act and the role of the Maritime Commission in discharging its responsibilities under Section 15. Accordingly, before turning to examine the specific conference arrangements disapproved here, we pause briefly to notice the history of the governing statute as it reveals the general approach which the Commission should follow in approving or disapproving carrier agreements.

1. Shipping conferences, which are associations of steamship companies organized for the purpose of fixing rates, allocating traffic and in general of restrict-

ing competition in a particular trade, originated in the latter half of the Nineteenth Century. Marx, *International Shipping Cartels* (1953), 3, 45–50. In due course, the Congress received complaints that the monopoly power of the conferences had led to abuses and became concerned with the concentration of governmental power in private hands. In 1912 the House of Representatives reacted by directing the Committee on Merchant Marine and Fisheries (the Alexander Committee) to make a thorough investigation of the maritime industry. H. Res. 425 and H. Res. 587, 62d Cong., 2d Sess., 48 Cong. Rec. 2835–2836, 9159–9160. Following extensive hearings, the Committee issued a comprehensive report.[6]

The Committee noted that many advantages resulted from the use of the conference system and that these advantages were not likely to be preserved by unrestricted competition.[7] Accordingly, it concluded that some exemption from the antitrust laws was necessary to accommodate the unique needs of the shipping industry. On the other hand, the Committee found that the conferences were guilty of many abuses and expressed strong objection to the unsupervised exercise of quasi-governmental power by steamship

[6] House Committee on Merchant Marine and Fisheries, *Report on Steamship Agreements and Affiliations in the American Foreign and Domestic Trade*, H. Doc. No. 805, 63rd Cong., 2d Sess. ("Alexander Report").

[7] The advantages enumerated were "regularity and frequency of service, stability and uniformity of rates, economy in the cost of service, better distribution of sailings; maintenance of American and European rates to foreign markets on a parity, and equal treatment of shippers through the elimination of secret arrangements and underhanded methods of discrimination." Alexander Report, p. 416.

conferences and other such combinations.[8] It repeatedly emphasized that preservation of the advantages and elimination of the abuses connected with the operation of the conference system required effective and continuing governmental supervision and control (Alexander Report, 416–420). The Report stated (*id.*, at 418):

> [S]teamship companies, through private arrangements have secured for themselves monopolistic powers as effective in many instances as though they were statutory * * *. They exercise their powers as private combinations and are apt to abuse the same unless brought under effective government control.

It was against this background of increasing concern over the prevalence of government by private agreement in the maritime industry that the Shipping Act was enacted in 1916. See *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, 487–490; *id.*, at 503–513 (dissenting opinion of Justice Frankfurter); *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213, 218–219. While a number of the provisions of the Act relate to abuses by individual carriers and other persons subject to the Act,[9] Section 15 is the heart of

[8] The findings of the Alexander Report are summarized in *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, 487–490. See, also, *Report on the Ocean Freight Industry*, H. Rep. No. 1419, 87th Cong., 2d Sess., 8–14.

[9] Section 14, 46 U.S.C. 812, prohibits carriers from paying or allowing deferred rebates to any shipper; using "fighting ships" for the purpose of driving competing carriers out of the trade; retaliating against shippers who patronize other carriers; or unfairly or unjustly discriminating against shippers. Section 16, 46 U.S.C. 815, forbids any person subject to the Act to give any undue or unreasonable preference or advantage, or to engage in

the statutory scheme, the central purpose of which is to bring concerted action by members of the maritime industry under more effective control. While validating the conference system, Section 15 subjects it to full disclosure and the close scrutiny of the Maritime Commission. Persons subject to the Act—including carriers—are required to file with the Commission all agreements which, *inter alia,* fix rates, allocate ports, and regulate competition. The Commission is assigned the duty of evaluating all such arrangements and it is enjoined to disapprove not only those which contain specific practices expressly condemned by the Act, but all those found to be unjustly discriminatory or unfair or detrimental to the commerce of the United States. Until approved, no agreement required to be filed may be implemented. On the other hand, once approved, the conference agreement becomes immune from challenge under the antitrust laws.[10] A continuing process of policing and regulation is contemplated, for the section authorizes cancellation or modification of any agreement, whether or not previously approved.

In 1961, an even broader criterion for evaluating anticompetitive agreements was added. Prompted by this Court's decision in 1958 in *Federal Maritime Board* v. *Isbrandtsen Co.,* 356 U.S. 481, two House com-

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certain other unfair practices. Section 17, 46 U.S.C. 816, besides requiring all persons subject to the Act to establish, observe and enforce just and reasonable regulations relating to the handling or delivery of cargo, forbids unjust discrimination by common carriers by water.

[10] The continued application of the antitrust laws to agreements which have not been filed and approved was reaffirmed last term. *Carnation Co.* v. *Pacific Westbound Conference,* 383 U.S. 213.

mittees conducted extensive investigations of the Shipping Act.[11] These led to its amendment in several respects in 1961. 75 Stat. 762. Of relevance here was an amendment to Section 15 which empowered the Commission to modify or disapprove conference agreements on the additional ground that they are "contrary to the public interest."

In summary, then, the Shipping Act represents the judgment of Congress that conferences are a necessary evil but that they must be kept under constant surveillance and effectively regulated to prevent abuses. The special function of applying the general provisions of the Act—of deciding which anticompetitive agreements are justified and therefore merit immunity from the antitrust laws—was entrusted to the Commission as the "administrative body especially trained and experienced in the intricate and technical facts and usages of the shipping trade * * *." *U.S. Nav. Co.* v. *Cunard S.S. Co.*, 284 U.S. 474, 485. That this was intended as a broad grant of authority is indicated by the very generalized standards announced in Section 15 to guide the Commission. Obviously,

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[11] Hearings Before House Antitrust Subcommittee of Committee on the Judiciary, on *Monopoly Problems in Regulated Industries: Ocean Freight Industry*, 86th Cong., 1st and 2d Sess., pt. 1, vols. I–V, and pt. 2, vols. I–II (1959–1960), 87th Cong., 1st Sess., pt. 2, vol. III (1961). The results of the investigations of this subcommittee are contained in the Report of the Antitrust Subcommittee of the House Committee on the Judiciary on *The Ocean Freight Industry*, H. Rep. No. 1419, 87th Cong., 2d Sess.

Hearings Before Special Subcommittee on Steamship Conferences of Committee on Merchant Marine and Fisheries, on *Steamship Conference Study*, 86th Cong., 1st Sess., pts. 1–3 (1959).

Congress left much to the expert judgment of the agency—which must particularize the statutory standards through their application to individual situations. See *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, 520–521 (dissenting opinion); cf. *Atlantic Refining Co.* v. *Federal Trade Commission*, 381 U.S. 357, 367–368; *Udall* v. *Tallman*, 380 U.S. 1, 16; *National Labor Relations Board* v. *Hearst Publications*, 322 U.S. 111, 130. And the courts should, of course, respect the discretion conferred upon the Commission by giving due deference to its decisions. *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607; cf. *Swayne & Hoyt, Ltd.* v. *United States*, 300 U.S. 297, 303–304; *Atlantic Refining, supra*, 381 U.S. at 367–368.

2. In our view, the court below misunderstood the Commission's role under Section 15 of the Shipping Act. The agency is not required to treat every provision of a conference agreement as presumptively valid—no matter how restrictive or unfair it appears on its face—and approve it unless it has conclusively been shown to inflict serious injury wholly without justification. That might be the standard if the Shipping Act had entrusted courts—rather than a specialized tribunal like the Federal Maritime Commission—with jurisdiction to entertain suits challenging maritime agreements that were effective until set aside by judicial order. But the statutory scheme is significantly different: no agreement subject to the Act may be implemented until submitted to, and approved by, the Commission[11a] and that body is invested with a

[11a] Thus, the court below misspoke when it stated that "There is no doubt whatsoever that the petitioner Conference was

broad discretion to disapprove the tendered arrangement, even if no one attacks it. It follows, we submit, that the Commission may place the burden of justifying a particular agreement on its sponsors, at least where, as here, the provisions submitted are obviously prejudicial to relevant interests and serve no apparent legitimate purpose. At all events—"presumptions" and questions of "burden of proof" aside—it is plain that the Commission is not required to act the role of a mere arbiter, judging the matter before it in accordance with the preponderance of the evidence adduced by proponents and opponents of a conference practice. The Commission may—indeed, must—bring to bear its own expert knowledge. In short, the court below to the contrary notwithstanding (see R. 654), "rationalizations, conjecture and opinion" have a place in the agency determination.

On the other hand, the Commission's decisions should not be predicated on the assumption that maritime affairs are wholly *sui generis*. National policy, reflected in the antitrust laws and provisions embodying the democratic principle of majority rule, are not irrelevant here. To be sure, the Shipping Act recognizes that what would be illegal in another context may be condoned in shipping agreements—witness the antitrust immunity conferred on approved arrangements. But ordinary notions of fairness and the usual ban on anticompetitive practices apply here, except only as the special problems of the shipping industry may

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authorized by Section 15 of the Shipping Act, 46 U.S.C. § 814, to act in concert in all shipping matters until and unless the actions were found illegal by the Commission * * *" (R. 652–653, footnote omitted).

dictate otherwise. See *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, 487–493; *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213, 217–220; *Report on The Ocean Freight Industry*, H. Rep. No. 1419, 87th Cong., 2d Sess. 384–386; S. Rep. No. 860, 87th Cong., 1st Sess. 4–6.

Properly judged, we submit the Commission's decision here demonstrated that it was acting "well within the mainstream of its duties" (*National Labor Relations Board* v. *Erie Resistor Corp.*, 373 U.S. 221, 236). It rejected the tieing rule because it found that the rule was seriously anti-competitive, inflicting injury on three distinct interests—the non-conference carriers, the travelling public and the travel agents—without any showing that the special needs of the shipping industry required this result. And the Commission disapproved the unanimity rule—in the unqualified and absolute form in which it here operated (no time limit; veto power in conference members which do not even serve United States ports)—upon finding that the rule, not shown to serve any legitimate purpose, had not proven sufficiently flexible for conference members to respond to changed conditions and, in addition, had contributed significantly to the competitive disadvantage of the steamship lines. As we now show, those conclusions are based on sound premises, fully sufficient to justify the ultimate order.

II

THE COMMISSION ARTICULATED A SUFFICIENT BASIS FOR DISAPPROVING THE "TIEING RULE"

The tieing rule prohibits conference-appointed travel agents from also acting as agents for compet-

ing nonconference carriers. On its face, this amounts to a group boycott, clearly condemned by the antitrust laws. See, *e.g.*, *United States* v. *General Motors Corp.*, 384 U.S. 127, 146–147; *Klors, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207; *Northern Pac. R. Co.* v. *United States*, 356 U.S. 1, 5; *Fashion Originators' Guild of America, Inc.* v. *Federal Trade Commission*, 312 U.S. 457. That was reason enough to treat the rule as suspect, since, as we have seen, the scheme of the Shipping Act was to do "a minimum of violence to the well-established American antitrust concept." H. Rep. No. 498, 87th Cong., 1st Sess. To be sure, some anticompetitive agreements are condoned in the maritime area—notably, the conferences themselves. But, with only rare carefully circumscribed exceptions,[12] the Shipping Act licenses only arrangements which limit competition among the parties to the agreement, not combinations to injure third parties. Indeed, this Court has said that "Congress was unwilling to tolerate methods involving ties between conferences and shippers designed to stifle independent carrier competition." *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, 492. And, of course, the same principle applies to arrangements between conferences and travel agents which have the same object.

In light of the well-settled doctrine that boycott arrangements of the kind here at issue are illegal *per se*, we submit the Commission would have been justified

[12] Thus, in Section 14b of the Act, as amended in 1961, 46 U.S.C. 813a, so-called "dual rate" contracts are authorized, despite their adverse effect on non-conference members, but only under the conditions and limitations specified.

in disapproving the conference agreement before it without more—unless a compelling justification was shown, and it was not. But the Commission did not stop there. It went on to examine the tieing rule in the concrete context of the case. Thus, the Commission found that since conference members carry about 99 percent of the transatlantic steamship passenger trade and the agents appointed by them ordinarily account for about 80 percent of the bookings in the United States (exclusive of cruises), the effect of the rule is to impose serious restraints upon three distinct interests: the nonconference carriers; travel agents; and the traveling public. The few transatlantic carriers who remain outside the conference and who, like the conference members, must depend upon travel agents for securing business, are denied access to the 4,000 agents who represent conference lines [13] and are thus substantially handicapped in competing for the transatlantic passenger trade. Conference agents are prevented from booking passage on vessels their clients may prefer. And, finally, travellers are greatly impeded in using the valuable services of travel agents should they wish to travel by non-conference vessel.

These findings cannot be disputed. Indeed, if the rule is enforced—and clearly it has been in the past (R. 65, 395–397)—the consequences which the Commission specified are bound to occur. There can be no doubt about the substantial nature of the obstacle which the rule creates for non-conference carriers.

[13] While the record does not reveal precisely what percentage of the total number of travel agents the conference-appointed agents constitute, respondents' counsel accepted an estimate of 90 percent. Transcript of Oral Argument on Remand before the Commission, p. 89.

Non-conference carriers, like conference lines, are concededly highly dependent upon travel agents for securing passenger business (R. 13–14). Yet the rule bars these carriers from access to the more than 4,000 conference-appointed travel agents, generally the best-established and most successful. In some degree, at least, such a restriction will inevitably injure the non-conference carriers, the travel agents and the traveling public. In fact, the Commission found that agents have turned away prospective bookings because of the rule (R. 46–47; 144–145, 540). Admittedly, there was no proof that the tieing rule had been *wholly* effective in depriving outsiders of travel agents. The Commission did not find, for example, that a non-conference carrier cannot find non-conference agents to represent it or that a prospective passenger on a non-conference line has nowhere to go to book his passage. But no such evidence is required. An arrangement may be "detriment[al] to the commerce of the United States" or "contrary to the public interest," although it does not altogether destroy a competitor or wholly deprive the public of access to his services. Section 15 gives the Commission in "the broadest possible language" (*Federal Maritime Commission* v. *New York Terminal Conference*, 373 F. 2d 424, 427 (C.A. 2) a wide range of discretion within which to determine when the harm caused by an anti-competitive agreement is sufficiently serious to warrant its disapproval, and the Commission's judgment in the instant case was well within that range.

It remains to consider whether special reasons required approval of this destructive practice. As already noted, the Commission found that the confer-

ences advanced no serious justification for the rule. Had they done so, the Commission recognized that it would have been obliged to balance the harms against the legitimate benefits flowing from the rule. But the defenses asserted were on their face insubstantial, as a mere statement of them demonstrates. One justification advanced for tieing up the agents was that the conference members had invested considerable amounts in the servicing of their agents (R. 8). The Commission found, however, that the services rendered by the conference were paid for by the agents themselves, that certain promotional services were rendered by individual lines, rather than by the conference, and often required matching contributions by the agents; and that the services in any case did not entitle the conference "to maintain a complete foreclosure over agents' services for non-conference lines" (R. 564, fn. omitted).[14] The Commission also rejected the assertion that the rule is necessary to maintain conference stability, pointing out that the Caribbean trade operates satisfactorily without it (R. 564).

We conclude that the Commission had ample basis to disapprove the tieing rule—an obviously pernicious arrangement on its face, which was shown to operate to the prejudice of the non-conference carriers, the

[14] At the administrative hearing, the conference secretary also suggested that the rule was necessary to protect the agents from financial injury that might be inflicted by irresponsible fly-by-night non-conference operators (R. 8–9, 12). We assume this suggestion was not further pressed because it is hardly realistic to suppose that a conference-imposed rule is necessary to protect travel agents—independent businessmen who regularly assume a large responsibility in complex business transactions—from the risks of dealing with irresponsible carriers. See *Standard Oil Co.* v. *United States*, 337 U.S. 293, 306.

travel agents and at least some travelers, and for which no persuasive justification was offered.

III

THE COMMISSION ARTICULATED A SUFFICIENT BASIS FOR DISAPPROVING THE UNANIMITY RULE

The second provision of the conference agreements challenged in these proceedings was the so-called "unanimity rule," which, as applied here, requires the unanimous vote of the members before any change may be made in the level of the travel agents' commissions. The Commission disapproved this requirement—which had not been shown to serve any important regulatory purpose—because it impairs the flexibility of the conference in responding to changed circumstances, and, in practical operation, inhibits the ability of the member lines to effectively compete with the airlines. Those findings—adequately supported by the record—were, we submit, sufficient predicate for disapproving the rule as detrimental to commerce and contrary to the public interest.

A. THE UNANIMITY RULE IMPAIRS THE ABILITY OF THE CONFERENCES TO RESPOND TO CHANGE

Conference agreements commonly provide some procedure for making changes in the terms of the agreement: by unanimous vote, two-thirds vote or majority vote. See S. Rep. 860, 87th Cong., 1st Sess. 15.[14a] But the method provided is not a matter of indifference. Indeed, the legislative history of the 1961 amendment

[14a] Of the 113 conferences serving United States ports in 1958, almost two-thirds did not require a unanimous vote on rate matters. *Ibid.*

to the Shipping Act reflects a concern with the voting procedures followed by the conferences. To be sure, Congress did not outlaw conference agreements which required more than a majority vote. Yet, the Senate Report accompanying the bill which was ultimately enacted, clearly invites the Commission to scrutinize the voting rules in effect and to disapprove those which it finds operate in a harmful way. S. Rep. No. 860, 87th Cong., 1st Sess. 15. Thus, there can be no question of the Commission's power to strike down a particular voting procedure.

We deal here with a unanimity rule in unabated form. In contrast to the unanimity provision of the airline industry, the present rule, as the Commission pointed out, is absolute and unqualified (R. 547, 556 n. 11, 559 n. 14). The Civil Aeronautics Board has insisted upon definite limitations of the effective time periods of IATA resolutions, because a provision which would "enable a single carrier to freeze the rate structure * * * would create an intolerable situation." See *IATA Traffic Conference Resolution,* 6 C.A.B. 639, 645; *North Atlantic Tourist Commissions Case,* 16 C.A.B. 225, 229. Here, on the contrary, previously made rates remain frozen without limit as to time and can never be changed without unanimous action. That is sufficient reason to view the rule with suspicion.

But the Commission did not make an *a priori* judgment. After reviewing the ten-year operation of the unanimity rule, the agency concluded that the veto provision had the effect of depriving the conference of a workable decision-making process. Although the conference's failure to keep complete minutes of its

meetings rendered it difficult to make a detailed evaluation (R. 554), such records as were available revealed that the rule had operated to block the desires of a strong majority (R. 276–277, 282, 555–556). Furthermore, the records obtained from a member line (rather than the conference itself) revealed that upon at least one occasion one member had exercised its veto power to prevent an immediate increase in commission rates (R. 536, 556, 374(2)). Indeed, as the Commission pointed out, the one carrier preventing change may not even serve United States ports and thus may derive little, if any, of its business from travel agents in the United States (R. 559, n. 14).

In the absence of a credible suggestion by the conference that the rule serves any legitimate purpose (R. 559), we submit the Commission was fully justified in concluding the unanimity requirement unduly restricts the ability of the conference to accommodate to changed conditions, even when a responsive majority is anxious to do so.

B. THE UNANIMITY RULE, IN OPERATION, INHIBITS THE ABILITY OF THE CONFERENCE LINES TO COMPETE EFFECTIVELY WITH THE AIRLINES

The stultifying effect of the unanimity rule is well illustrated by the Commission's finding that it operated, in practice, to prevent a majority of the conference lines from conceding increased commissions to their agents, which would have encouraged them to promote ship travel and thus reduce the competitive advantage of the airlines.

Conference lines are highly dependent upon their travel agents, who also represent the transatlantic air-

lines (R. 456–457, 562). Because the job of selling a steamship ticket is more burdensome and time-consuming and the level of basic commissions paid by the steamship lines was either lower or the same during the relevant period (1950–1961), there was a "definite tendency" for travel agents to "push" airline bookings (535–537, 557–560).[15] Recognizing the problem, a strong majority of the conference lines throughout much of this period wanted to increase their commissions to travel agents to offset the advantage of the airlines; but the unanimity rule frustrated their efforts (R. 535–536, 554–555).[16] Thus, the Commission concluded that the unanimity rule had been a factor in preventing the steamship lines from improving their competitive position (R. 557–561).

This finding is not vulnerable because transatlantic air travel enjoys other advantages unrelated to the rate of commissions paid to travel agents. Of course, the pre-eminence of the airlines is in part attributable to the speed and convenience of jet planes, and to extensive advertising. But, it does not follow that the promotional efforts of travel agents are unimportant. And, of course, it requires no expertise to know

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[15] A substantial segment of prospective travellers (between 15 and 60 percent) come to travel agencies without a fixed preference for mode of transportation and are open to suggestions (R. 537).

[16] The rule had thwarted attempts by a majority to increase basic commission level for at least 6 years (1950–1956) and the tour commission level for over 2½ years (May, 1960–December, 1962). Because of lack of unanimity, a majority of the lines was unable to put through an increase in the basic commission rate to 7½ percent in 1950 and this level had not been achieved as late as 13 years later (R. 276, 282, 535–537, 554–555).